PROPOSED AMENDMENT AND ADOPTION OF REGULATIONS BY THE STATE LABOR COMMISSIONER TO IMPLEMENT THE PROVISIONS OF AB 633 AND OTHER STATUTES GOVERNING ENFORCEMENT OF MINIMUM WAGE AND OVERTIME REQUIREMENTS IN THE GARMENT INDUSTRY, AND THE REGISTRATION OF PERSONS ENGAGED IN GARMENT MANUFACTURING

FINAL STATEMENT OF REASONS

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code §11346.9(d), the Labor Commissioner incorporates the Initial Statement of Reasons prepared in this matter.

A.

The following sections were amended following the public hearing and circulated for further public comment:

§13631. Recordkeeping.

The provision that failure to provide specified records to the Labor Commissioner "immediately upon request" shall provide grounds for revocation of registration or denial of an application for registration was modified to clarify the specific time period for compliance. The phrase "immediately upon request" was replaced by the phrase "within ten days of the date of request."

§13633. Registration of Employee Leasing Companies and Temporary Agencies.

The provision in subsection (b) that the failure of an employee leasing company or temporary agency to provide the Labor Commissioner with "immediate written notice" whenever it enters into or terminates an arrangement to lease or otherwise provide employees engaged in garment manufacturing operations to a garment manufacturer or contractor shall constitute grounds for revocation of registration or denial of an application for registration was modified to clarify the specific time period for compliance. Instead, such written notice is now required "within ten days of the date of entering into or terminating the arrangement."

§13634. Requirements for Registration.

Subsection (a) was modified to indicate that the various items of information which must be provided by an applicant for registration are part of an application form,

DLSE 810 (REV. 03/02), provided by the Labor Commissioner, and this form is now incorporated by reference. Due to the length of the application form (six pages) and the need to have it accompanied by specific instructions, the Labor Commissioner concluded that publication of the form in the California Code of Regulations would be both cumbersome and impractical. Notice of the addition of the application form to the rulemaking record and its availability for review was mailed to the public on March 29, 2002.

Also, the applicant's social security number and California driver's license number were added to the information that is required to be provided on the application form. The reason for requiring this information is that the person's name and address may not be sufficient to identify exactly who is applying for registration. Also, this additional information will better enable the Labor Commissioner to investigate the applicant with respect to unpaid judgments, prior registrations, etc. Finally, this information will assist the Labor Commissioner in the collection of any future judgments that may be entered against the applicant.

Subsection (c) was added to provide that residence addresses, social security numbers, and California driver's license numbers listed in the application for registration are for the Labor Commissioner's use for licensing and law enforcement purposes, and are confidential and shall not be disclosed to any person other than an employee of a law enforcement agency, except if required by a court or if necessary for the prosecution, by the Labor Commissioner, of any judicial or administrative proceeding. This is intended to ensure that this information be exempt from disclosure to the public, and to balance the applicants' privacy rights with the Labor Commissioner's need for this information.

§13635. Registration and Examination Fees.

Subsection (f) was modified to lower the examination fee from $50 to $25.

§13659. Information to be Contained in Contracts Between Manufacturers and Contractors, and on Itemized Wage Statements Provided to Employees.

Subsection (c) was modified to ease garment contractors' recordkeeping requirements. Prior to this modification, the proposed regulation required contractors to provide their employees with information in writing, on their paycheck stubs, specifying the name(s) of any manufacturer(s) for whom the contractor performed any garment manufacturing operations at the location at which such employees were employed during the pay period for which they are being paid; and if work was performed for more than one manufacturer during this period, to list, next to each named manufacturer, the percentage of work time during the pay period that the employee performed work for the named manufacturer. The latter requirement, to list percentages of time if more than one manufacturer is listed, has been deleted. The requirement to list the names of manufacturers was retained, as unless this information is provided on pay stubs, garment workers may have no means of acquiring information as to the identity of any wage guarantors. Each

guarantor's proportionate liability for the wage guarantee can then be determined in the course of the Labor Commissioner's investigation of any wage claims.

B.

Following the public hearing, additional non-substantive clerical corrections were made to the regulations as follows:

In §13634(a)(21), the incorrect reference to "section 13635(e)" was changed to correctly reference "section 13635(d)," the subsection that defines the term "gross sales receipts."

In §13635(a)(1), the category of "gross sales receipts of less than $100,000" was modified to "gross sales receipts of $100,000 or less," at subsection (a)(2), the category of "gross sales receipts of $100,000 to $499,999.99" was modified to "gross sales receipts from $100,001 to $500,000," at subsection (a)(3), the category of "gross sales receipts of $500,000 to $1,000,000" was modified to "gross sales receipts from $500,001 to $1,000,000," and at subsection (a)(4), the category of "gross sales receipts in excess of $1,000,000" was modified to "gross sales receipts of $1,000,001 or more." In subsection (b)(1), the category of "gross sales receipts of less than $500,000" was modified to "gross sales receipts of $500,000 or less," in subsection (b)(2), the category of "gross sales receipts of $500,000 to $2,999,999.99" was modified to "gross receipts from $500,001 to $3,000,000," in subsection (b)(3), the category of "gross receipts of $3,000,000 to $7,000,000" was modified to "gross receipts from $3,000,001 to $7,000,000," and in subsection (b)(4), the category of "gross receipts in excess of $7,000,000" was modified to "gross receipts of $7,000,001 or more."

In §13635.1(d)(1) and (d)(2), the reference to "subdivision ©" was corrected to "subdivision (c)."

In §13644(b), initial caps in the term "Notice of Posting of the Bond With the Labor Commissioner Pursuant to Labor Code section 2673.1" were changed to lower case to read: "notice of posting of the bond with the Labor Commissioner pursuant to Labor Code section 2673.1."

C.

Both the text as originally noticed and the modified text contained errors in the display of the existing text of the California Code of Regulations (CCR). Description of the errors and their corrections in the final text of the regulations are as follows:

In §13647, the existing phrase in the CCR "assumed and, " unintentionally omitted from the section in both the originally proposed text and the modified text of the regulations, has been restored in the final text of the regulations.

In §13651(a), the word "reasonable" used in the CCR was unintentionally replaced with the word "responsible" in both the originally proposed text and the modified text of the regulations and has been restored in the final text of the regulations.

LOCAL MANDATES DETERMINATION

These regulations impose no mandates on local agencies or school districts.

SUMMARY AND RESPONSE TO COMMENTS:

During the public comment period following issuance of the proposed regulations, written comments were received from the following persons: 1) a coalition of advocates for garment workers, consisting of the Asian Immigrant Womens' Advocates (AIWA); Asian Law Caucus; Asian Pacific American Legal Center (APALC); Bet Tzedek Legal Services; California Labor Federation, AFL-CIO; Coalition for Humane Immigrant Rights of Los Angeles; Legal Aid Society of San Francisco-Employment Law Center; Los Angeles Jewish Commission on Sweatshops; Progressive Jewish Alliance; Sweatshop Watch; Union of Needletrades, Industrial and Textile Employees, AFL-CIO, CLC (UNITE); and Women's Employment Rights Clinic of Golden Gate University School of Law [to be referred to hereinafter as the "AIWA" comments], 2) Richard Simmons and Jennifer Bates of the law firm Sheppard, Mullin, Richter & Hampton, on behalf of the Garment Contractors' Association of Southern California ["Simmons"], 3) Stanley Levy of the law firm Mannatt, Phelps & Phillips, on behalf of Kellwood Company, a garment manufacturer ["Levy"], 4) Paul Gill, a consultant to garment manufacturers and contractors ["Gill"], 5) Antonio R. Sarabia II, an attorney, in two separate written responses on behalf of two businesses engaged in garment manufacturing, Earl Jean, Inc. ["Earl Jean"], and Fashion 21, Inc. ["Fashion 21"], 6) Kevin Raffi, the owner of Chevion Sportswear, a business engaged in garment manufacturing ["Raffi"], 7) Kevinxxxxxxx ["Kevinx"], 8) Peggy Zumwalt, the general manager of Stormy Leather, a garment manufacturer ["Zumwalt"], 9) the anonymous owner of a business engaged in garment manufacturing ["Anonymous"], and 10) Beverly Libaire, the owner of a business engaged in garment manufacturing ["Libaire"].

During the public hearings, oral comments were received from the following persons: 1) Marcy Seville, director of the Women's Employment Rights Clinic at Golden Gate University School of Law ["Seville"], 2) Wayne Lee ["Lee"], 3) Nikki Bas, the director of Sweatshop Watch ["Bas"], 4) Richard Ow ["Ow"], 5) Stan Levy of the law firm Mannatt, Phelps & Phillips, on behalf of Kellwood Company, a garment manufacturer ["Levy-S"], 6) Jennifer Bates of the law firm Sheppard, Mullin, Richter & Hampton, on behalf of the Garment Contractor's Association of Southern California ["Bates"], 7) Joseph Rodriguez, executive director of the Garment Contractors' Association of Southern California ["Rodriguez"], 8) Ron Perilman, one of the owners of City Girl, a business engaged in garment manufacturing ["Perilman"], and

9) Christina Chung, staff attorney for the Asian Pacific American Legal Center, an organization that represents garment workers ["Chung"].

During the public comment period following the issuance of the post-hearing revisions, written comments were received from the following persons: 1) Marcy Seville on behalf of a coalition of advocates for garment workers, consisting of the Asian Pacific American Legal Center (APALC), Sweatshop Watch, Garment Workers Center of Southern California, and the Women's Employment Rights Clinic of Golden Gate University School of Law [to be referred to hereinafter as the "APALC" comments], 2) Paul Gill, a consultant to garment manufacturers and contractors ["Gill"], 3) Stanley Levy of the law firm Mannatt, Phelps & Phillips, on behalf of Kellwood Company, a garment manufacturer ["Levy"], 4) Richard Simmons, Tracey Kennedy, and Jennifer Bates of the law firm Sheppard, Mullin, Richter & Hampton, on behalf of the Garment Contractors' Association of Southern California ["Simmons"], 5) Ilse Metchek of the California Fashion Association, an industry trade group ["Metchek"], 6) Mark Luevano, an attorney representing a business engaged in garment manufacturing ["Luevano"].

Following the close of the public comment period, additional written comments was received from Randall Harris of San Francisco Fashion Industries, an industry trade group ["Harris"]. As these were the only untimely received comments, the Labor Commissioner will respond to them along with the above-listed timely written and oral comments.

The overwhelming number of comments were presented or fell within the scope of individual regulations and therefore are organized that way below. Some comments proposed the adoption of regulatory provisions on issues that, though within the general ambit of the garment manufacturing statutes, were not specifically addressed by and do not fall within the scope of any of the proposed regulations. These comments on matters as to which the Labor Commissioner chose not to regulate are summarized and responded to following the comments and responses to §13659, below. No comments were made about the procedures followed in proposing the regulations.

§13630. Registration of Manufacturers and Contractors.

AIWA: Support the general language of this regulation, and particularly, as construed by the Labor Commissioner in the Initial Statement of Reasons, that every entity engaged in "garment manufacturing" within the statutory definition must register, either as a "contractor," or if the entity does not fall within the statutory definition of a "contractor," as a "manufacturer." In contrast, the more detailed definition of "manufacturer" proposed by Gill, see below, would create loopholes, allowing entities that should be registered to avoid the registration requirements and guarantor liability. The Commissioner's less detailed definition of "manufacturer" set out in this regulation is a better approach to ensuring that AB 633's wage guarantee will not be defeated by changes in garment industry business practices. However, the Labor Commissioner should clarify whether the proposed regulations would exempt retailers that are engaged in garment

manufacturing from registering under Labor Code §2675 or from the wage guarantee provisions of Labor Code §2673.1. Some retailers (that is, entities that sell garments) are also engaged in garment manufacturing--the Commissioner should clarify that they are subject to registration and the wage guarantee. Also, the Commissioner should clarify whether a business engaged in garment manufacturing would be required to register as a manufacturer, and be subject to the wage guarantee, even if it does not own the fabric throughout the manufacturing process. Finally, the regulation should explicitly provide that registration is required for all persons engaged in garment manufacturing, regardless of where the entity is incorporated or where it has its principal place of business, so as to ensure that if the manufacturing is performed in California by the contractor's employees, the manufacturer that entered into the contract with the contractor to have the work performed will be subject to the wage guarantee, regardless of the manufacturer's residence.

Gill: The regulation should attempt to specify the circumstances under which a retailer is required to register as a manufacturer, and when it is not; and the precise factors which determine whether a person engaged in garment manufacturing must register as a contractor or as a manufacturer. The proposed regulation does not provide any further clarification to the definitions already set out in the law. The failure to provide greater specificity as to what practices result in the obligation to register and liability as a wage guarantor will lead retailers to decline to purchase any garments manufactured in California. More precise definitions should be based on business practices. Contractors sell labor to manufacturers. Manufacturers, in turn, sell finished goods to retailers. A critical distinction between contractors and manufacturers is based on who purchases and owns the fabric before it has been converted into finished goods. A contractor that sells "packaged goods" or a finished product to a retailer ought to be registered as a manufacturer. The definition of "contractor" should be clarified to provide that "a person registered as a contractor may not sell or resell finished products of wearing apparel." The definition of "manufacturer" should be clarified to provide that a manufacturer is "a person whose business is to purchase materials and convert them in California, into finished goods of wearing apparel or accessories for sale or resale, and who owns the materials so purchased continuously throughout the manufacturing process with title to the finished goods passing to another after the sale." The regulation should also specify that "a person that engages in the process of assembling garments as defined in [Labor Code] §2671(d) that also sells or resells such products must be registered with the Commissioner as a manufacturer." The regulation should create a safe harbor for retailers who do not engage in garment manufacturing by providing that "any individual or company that purchases finished goods of wearing apparel from a registered manufacturer or purchases services incidental to the manufacturing process from a registered manufacturer shall not be required to register with the Labor Commissioner and shall not be presumed to be engaged in garment manufacturing by the Commissioner unless that entity also engages in activities described in §2671(d)." In order to protect against the possibility that undercapitalized contractors will become "manufacturers" who sell finished goods to retailers, thereby depriving the employees who perform the garment manufacturing operations of the protection that would otherwise be offered by a guarantor, the regulation should also provide that

"notwithstanding the fact that an individual or company purchases finished goods from a registered manufacturer and that title to the goods remains with the manufacturer until sold, the individual or company [that purchases the finished goods] must register as a manufacturer with the Labor Commissioner if said individual or company has a legal financial interest in the materials or goods prior to the sale." Thus, if a retailer is loaning money on a secured basis to a business that manufactures finished goods, the retailer must register as a manufacturer, and will be liable as a wage guarantor.

Levy-S: Supports the definition of "manufacturer" set out in Gill's comments, above. This definition would result in more certainty and clarity than the Labor Commissioner's proposed definition, so as to let businesses know where the line is with respect to whether they are engaged in manufacturing at all, so as to know whether they have to register and whether they face liability for the wage guarantee. It is not enough to say, as the Commissioner's proposed regulation does, that "you are a manufacturer unless you are a contractor," because that doesn't explain precisely what operations fall within the definition of manufacturer. A bright line definition would help the industry.

Seville: 1) Regulation ought to clarify that out of state manufacturers are subject to registration and liability as wage guarantors if they contract for garment manufacturing operations to be performed in California. 2) Worker advocate groups are opposed to the proposed definitions recently submitted by the industry [referring to the Gill proposal, discussed above], in that they will encourage businesses to operate in a manner that evades wage guarantor liability. Instead, the Labor Commissioner should retain its proposed definition of contractors and manufacturers. If in the future, the various interested parties can reach an consensus on a more detailed definition of these terms, the regulation can be amended; but consensus has eluded the parties for the past two years, and the Commissioner's proposed definition is sufficient.

Bas: Supports the general language of the Labor Commissioner's proposed definition. A more detailed definition of what is and is not a practice sufficient to require registration would at best become obsolete as industry practices change, and at worst provide a road map to evade the registration requirement. Worker advocate groups do not support a definition [set out in the Gill proposal, above] of manufacturer that is tied to continuous ownership of fabric. This would impermissibly limit the scope of garment manufacturing which is broadly defined by the statute. The Commissioner's proposed regulation properly defines "manufacturer" to mean all persons engaged in garment manufacturing, as that term is defined in the statute, who are not contractors.

Chung: Same comments as those made by Bas, above.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)--

APALC: The revisions suggested by AIWA, above, should have been adopted by the Labor

Commissioner.
Metchek: We object to the proposed regulation. Instead, the Labor Commissioner should continue to use the pre-AB 633 regulation that defined "garment manufacturer" as "any person, whether an individual, partnership, corporation, or association, including manufacturer, jobber, wholesaler, contractor or subcontractor, who sews, cuts, makes, processes, repairs, finishes, assembles, or otherwise prepares any garment designed to be worn by any individual, for sale or resale, with the exclusion of a sole manufacturer or who is solely engaged in cleaning, altering or tailoring." In addition, the regulation should provide a safe harbor for retailers who purchase garments from registered manufacturers, as follows: "Any entity or individual that purchases for sale or resale garments, wearing apparel or accessories designed or intended to be worn by any individual, or services incidental to the manufacturing process, if such goods or services are purchased from a registered manufacturer, shall not be deemed to be engaged in garment manufacturing, and shall not be required to register, and shall not be subject to the wage guarantee of the Labor Code."

Response: No changes were made to this proposed regulation. With respect to AIWA's request for clarification, these regulations neither automatically exempt nor automatically include retailers as entities that are required to register as "manufacturers" so as to be subject to the wage guarantee provisions of Labor Code §2673.1. Those retailers that engage in "garment manufacturing" within the meaning of Labor Code §2671(b) must register, pursuant to Labor Code §2675(a); those retailers that do not engage in "garment manufacturing" need not register. As defined by statute, "garment manufacturing" includes the performance of various garment manufacturing operations that define a "contractor," within the meaning of Labor Code §2671(d), and the act of "contracting to have those operations performed." Under the proposed regulation, a "manufacturer" is a person that contracts to have garment manufacturing operations performed. If a retailer, by its actions, comes within that definition it must register as a manufacturer and is subject to the wage guarantee. Conversely, if a retailer, by its actions, does not come within that definition, there is no obligation to register or to guarantee the wages of the employees of any other employer. Ownership of fabric during the manufacturing process is not determinative of whether a person is, or is not, a manufacturer. To make that fact determinative, as suggested by Gill, would potentially limit the scope of "garment manufacturing," as defined at Labor Code §2671(b), in a way that is inconsistent with that statute. The Labor Commissioner does not believe that a regulation can excuse a business that contracts to have garment manufacturing operations performed from its statutory obligation to register as a manufacturer, or from its statutory obligation to guarantee the minimum wages and overtime wages of the contractor's employees. The act of contracting to have garment manufacturing operations performed triggers these statutory obligations without regard to whether the business that contracts owns, or doesn't own the fabric, during the performance of the manufacturing operations. Turning to AIWA's final suggestion, there is no need to amend the proposed regulation to explicitly provide that registration is required for all persons engaged in garment manufacturing, regardless of where the entity is incorporated or where it has its principal place of business. AB 633 obviously was intended to ensure the payment of minimum wages and overtime to garment employees who

perform garment manufacturing operations in California. A manufacturer that contracts with a contractor to perform these operations in California must register and is liable for the wage guarantee, regardless of the manufacturer's residence or the principal place of business of either the contractor or manufacturer. The Labor Commissioner does not believe that AB 633 can be interpreted in any other manner, so a regulation explicitly stating this would be unnecessary.

The Labor Commissioner disagrees that there is a need to amend the regulation to set out a more precise definition of manufacturer. The proposed revisions suggested by Gill and Levy, would establish a standard that is inconsistent with the statute. The proposal that ties ownership of fabric during the manufacturing process to the definition of a manufacturer may have accurately reflected practices in the garment industry prior to the passage of AB 633. However, shortly after AB 633 took effect, certain large garment manufacturers stopped providing their contractors with fabric, and instead, required their contractors to purchase the fabric that they were to convert into garments. Under this new system, after the contractor delivered the completed garments to the manufacturer, the manufacturer would pay the contractor for the cost of the fabric plus the cost of labor for converting that fabric into garments. Tying the definition of "manufacturer" to continuous ownership of the fabric during the manufacturing process would redefine contractors functioning under this new method of production as manufacturers, and suggest that those businesses that contract for the manufacture of these garments are not required to register as manufacturers and are not subject to liability as a guarantors of the wages of the employees that performed the garment manufacturing operations. This would undercut the very purpose of AB 633, and would contradict the proviso found at Labor Code §2671(b) that any regulations adopted by the Labor Commissioner "be consistent with current and future industry practices, but . . . not limit the scope of garment manufacturing, as defined on this subdivision." The fact that a contractor may be sufficiently capitalized to purchase fabric does not justify any narrowing of the statutory definition of "garment manufacturing" or the statutory test for liability as a wage guarantor---a liability that attaches under Labor Code §2673.1(a) against "a person engaged in garment manufacturing, as defined in §2671, who contracts with another person for the performance of garment manufacturing operations." Moreover, Gill's proposed definition of manufacturer, as it is further tied to the issue of whether the person contracting for the performance of garment manufacturing operations has a secured interest in the fabric being converted or goods being produced by the contractor, would make it difficult if not often impossible for the garment contractor's employees, or the Labor Commissioner, to ascertain whether a particular business that contracted for the production of garments is, a "manufacturer" under this proposal, so as to be liable for the wage guarantee.

The Labor Commissioner also rejects Gill's proposal that the regulation be amended to create a "safe harbor" for retailers who do not engage in garment manufacturing. If a retailer does not engage in "garment manufacturing" within the meaning of Labor Code §2671(b), the retailer would not be a "manuafacturer" as a matter of law, and thus, would not need any regulatory "safe harbor" provision. On the other hand, if a retailer contracts to have garment manufacturing operations performed, that retailer falls within the statutory definition of "garment

manufacturing," regardless of whether the entity with which the retailer contracts has designated itself, on its application for registration, as a "contractor" or as a "manufacturer." Thus, this "safe harbor" proposal is both unnecessary and misleading.

The Labor Commissioner rejects Metchek's proposals. The pre-AB 633 regulation now conflicts with the statute, in that it defines "garment manufacturer" in virtually the same way that Labor Code §2671(d) defines "contractor." Prior to AB 633, there was no real need to distinguish between garment manufacturers and contractors, in that both were required to register, both were subject to the same registration fees; and so long as both the manufacturer and the contractor with which it contracted to perform garment manufacturing operations were registered, neither was liable for the unpaid wages that might be owed to the other's employees. AB 633 made it critical to distinguish between contractors and manufacturers, in that the range of registration fees is higher for manufacturers than for contractors, and manufacturers are now "wage guarantors" and as such, are liable for payment of their contractors' employees' minimum wages and overtime. Moreover, the pre-AB 633 regulation failed to include the act of "contracting to have those [garment manufacturing] operations performed" as part of the definition of "garment manufacturer," and as such, it would now impermissibly narrow the scope of the statutory definition of "garment manufacturing," and thus, conflict with Labor Code §2671(b). For these reasons, the pre-AB 633 regulation cannot be retained.

Metchek's "safe harbor" proposal would encourage subterfuge, in that it would seemingly allow a retailer that contracts to have garment manufacturing operations performed to escape from its statutory obligations as a wage guarantor by requiring the contractors with which it wishes to do business to register as manufacturers, and then to contract only with those entities that self-designated themselves on applications for registration as "manufacturers." The only way to avoid this sort of subterfuge is to include, as we have in the proposed regulation, as provision that a person's designation on a registration as a "contractor" or "manufacturer" shall not preclude the introduction of evidence in any proceeding before the Labor Commissioner on the actual business practices of such person. Metchek's "safe harbor" proposal, in contrast, is inconsistent with AB 633 in that it would shield certain retailers from the wage guarantee notwithstanding the fact that such retailers may fall within the statutory definition of "garment manufacturing" at Labor Code §2671(b), and thus, be subject to the statutory obligation to guarantee payment of minimum wages and overtime wages to the employees of the contractor that performed these garment manufacturing operations.

§13631. Recordkeeping.

AIWA: We request that 13631 include the provision that "every employer engaged in the business of garment manufacturing is required to post in its shops or offices: a current list of the names of retailers, manufacturers or contractors with whom they are doing business, RN numbers of garments and contract dates (date entered into and date of completion). Every employer engaged in the business of garment manufacturing is required to keep the postings current by

updating them not less than monthly and to keep the postings as part of its records for a period of not less than four (4) years." In addition, §13631 refers to records being provided immediately upon request and to avoid confusion, we suggest that the words "within ten days of the date of request" be substituted for the word "immediately."

Simmons: The term "immediately" is impermissibly vague and ambiguous. This section adds substantial recordkeeping and production requirements for employers. Immediately is not reasonable since sometimes the records are difficult to locate and may be off premises. This regulation conflicts with Labor Code §2673.1(d)(1) and the IWC Orders which do not require immediate production. 2673.1 provides for 10 days. The IWC Orders, in addition, only require that the records be maintained for 3 years, as opposed to 4 years here. The enforcement mechanism of revocation of registration if the documents are not provided is draconian and does not contain the legal standards governing subpoenas. We request a period of at least 15 days.

Zumwalt: The additional recordkeeping requirements may be insignificant but the amount of oversight required to ensure the accuracy of the records and their accessibility for the extended time required is a burden on a small garment manufacturer. As it is, many garment manufacturers in California are going out of business.

Levy: Pricing is a trade secret and should not be disclosed.

Bates: The requirement that records be produced immediately is not reasonable. Defining a specific period would be more helpful.

MODIFICATION TO REGULATION: The last sentence of §13631 has been modified to substitute the time period of "10 days" for "immediately" and now provides that: "Failure to provide these records to the Labor Commissioner within 10 days of the date of the request...shall constitute grounds for revocation of registration..."

Comments Received Following Modification--

Simmons: This section still provides an unreasonable production upon demand requirement and fails to indicate whether a subpoena is required or that the request be in writing. The employer must produce all the requested records within a very short time frame and without the protections of a subpoena or risk having his registration revoked. The time requirement is still unreasonable. This section is also contrary to Labor Code §2673.1(d)(1) which provides for the production of records when a claim is filed. "It is unjustifiable and inconsistent to give the Labor Commissioner broader powers when no claim has been filed." As such it violates §2672 and the APA. Failure to require a subpoena for the records also implicates the Fourth Amendment since the employer may not be able to seek judicial review of the production demand.

Response: Sections 226 and 2673 of the Labor Code, which require that certain records be

maintained and pay stubs provided, are not new statutes. Labor Code §226 dates back to the 1940's and §2673 was adopted in 1980. These records are required to be kept by law. The records to be produced pursuant to §13659 relating to manufacturing contracts and pay stubs are necessary to identify potential guarantors and to insure that written contracts are utilized between manufacturers and contractors. Labor Code §2673.1(d)(1) requires production of documents within 10 days. We have modified the regulation from "immediately" to "10 days" in response to the comments concerning the confusion over the term "immediately." This regulation adopts the time period of 10 days as one which has been determined by the legislature to be reasonable, given §2673.1(d)(1). Recordkeeping is properly a licensing requirement as is cooperation with the Labor Commissioner's office. AIWA's suggestion that manufacturer information should be posted at the job site is unnecessary since §13659 provides that manufacturers' names be written on the employee's pay stubs. The fact that the Industrial Welfare Commission orders, which set minimum standards applicable to all California employers, requires employers to maintain certain pay records for three years does not preclude the Labor Commissioner from adopting a regulation specific to the garment industry requiring that certain specified records be kept for four years. The statute of limitations for wage claims is dependent on whether the entitlement to the claimed wages is statutory (then there is a 3 year statute of limitations) or contractual (either two years or four years, depending on whether the contract was oral or written). We believe pay records should be maintained for the entire period of the longest applicable limitations period. The requirement for the production of records following a demand by the Labor Commissioner, without a subpoena, does not violate the Fourth Amendment. The Labor Commissioner has two methods for enforcing such a demand -- 1) to issue a subpoena and if the records are not produced, to then enforce through court proceedings, and/or 2) to initiate registration revocation or application for registration denial proceedings, which are, of course, judicially reviewable by writ of administrative mandate. No matter how the Labor Commissioner chooses to proceed, judicial review is available. In this as in any number of other heavily regulated industries, there is nothing unconstitutional about making access to records a condition of licensure.

§13632. Advisory Committee.

No comments.

§13633. Registration of Employee Leasing Companies and Temporary Agencies.

AIWA: The regulations should include the following language: "The contractor or manufacturer that is a party to any agreement to lease or otherwise provide employees has the same obligation to register, pay wages, and be a guarantor of wages, that it would have if it were directly employing the employees covered by the agreement." In addition, subsection (b) should substitute for immediate written notice no later than ten (10) days from the date that it enters into or terminates an agreement.

Bas: Same comments as AIWA.

MODIFICATION TO REGULATION: Subsection (b) is modified to substitute "10 days" for "immediate" as the time period within which the leasing company or temporary agency must notify the Labor Commissioner that it enters into or terminates an agreement.

Comments Received Following Modification -- None

Response: It is unnecessary to specify that a manufacturer has to register, pay wages or be a guarantor since the leasing company or temporary agency is a joint employer of the employees covered by the agreement, as a matter of law. Therefore, this language would be superfluous. The request to amend subsection (b) to avoid confusion as to what immediate written notice means and to add the provision "written notice no later than ten (10) days from the date that it enters into or terminates an agreement" is well taken, and the regulation was changed to include that language.

§13634. Requirements for Registration.

Simmons: The requirement in subsection (a)(8) that registrants provide a copy of the most recent quarterly report to EDD to determine the number of employees is unreasonable and unjustified. The registration application already requires a disclosure of the number of employees. This requirement is not authorized by statute and violates the APA. Requiring the production of EDD reports violates the privacy rights of employers and employees. This would also compromise fair competition in that competitors will be able to use this confidential wage information to figure out how a company prices its work, sets pay and conducts business. Subsection (a)(11)'s requirement of disclosure of all persons and entities with whom the applicant has done business in the last three years creates a potentially insurmountable obstacle for employers seeking to renew. Many garment businesses appear and disappear within a relatively short time frame so that it would be difficult for the registrant to provide this information. The applicant should only be required to provide the names of entities in which it is currently doing business. It also is unreasonable because it creates a retroactive obligation prior to the time when an applicant was required to keep this information. The requirements of subsections (a)(3)-(7) and (15) to provide residence addresses invade the privacy rights of employees and shareholders and is ill-advised given the recent rise in workplace violence and terrorism. The provisions requiring the disclosure of individuals who "control the wages, hours and working conditions" of other employees is impermissibly vague and ambiguous. Requiring identification of managers and supervisors under subsections (a)(18)-(20) and (22) is unreasonable and unnecessary. Subsection (a)(8)'s requirement of disclosure of citations whether appealed or not or rescinded is improper and discriminatory. Subsection (a)(17) should be modified to allow the applicant the option of choosing to pay the maximum registration fee rather than report the amount of gross sales receipts since presumably that is the only reason behind its disclosure which would otherwise be an invasion of privacy and proprietary information. The catchall provision of subsection (a)(20) which requires the disclosure of family

members who operated in garment manufacturing is overbroad and difficult to interpret and is unnecessary to track family businesses.

Bates: Same comments as Simmons.

Levy: Subsection (a)(4) which requires the name and residence address of co-owners of a business should be required only for contractors who are privately held, not publicly owned. In the case of privately held manufacturers, only names and business addresses should be required. In the case of publicly owned businesses, no names or addresses of owner-shareholders should be required. Subsection (a)(7) should only require the residence addresses of officers and directors of privately held contractors. Subsection (a)(8) should allow for the redacting of all information on EDD reports except the information relating to number of employees. Subsection (a)(11) which requires the names and addresses and type of business entity which the application has had garment manufacturing contracts should not require the type of business since the applicant may not know the type of legal entity. Subsection (a)(13) should be amended to omit the requirement that residence addresses of managers and supervisors be listed. Subsection (a)(14) should only require the residence addresses of owners owning more than 20% in cases of privately owned contractors. Subsection (a)(15) should require residence addresses of contractor LLCs and not manufacturer LLCs.

Gill: Subsection (a)(3) should not include the residence addresses of owners. Any necessary tracing can be done through social security numbers or California drivers' license numbers.

AIWA: We strongly support the detailed information required of applicants for registration. One of the historic problems for garment workers has been the closure or relocation of businesses when wages remain unpaid and the inability to locate responsible parties and guarantors. Subsection (a) should be amended to read registration "and renewal of registration." Subsection (a)(9) should be amended to read "Types of business engaged in currently and for the past 3 years and whether the business operated as a garment manufacturer or garment contractor during this period." This information is needed to determine whether entities are changing their designation. Subsection (a)(18) should include a reference to violations of the IWC orders in addition to violations of the FLSA and the Labor Code. It should also be changed to include the amount of the citation paid. Subsection (a)(19) should add "releases or any other document reflecting an agreement to pay or resolve a claim for unpaid wages" and whether and how much has been paid in addition to the term "settlement agreements." Subsection (a)(21) should include any application "or other person identified in Section 20. Subsection (b) should be amended to include persons applying for renewal of registration. Also, a new subsection should be added to provide that incomplete information on the application will result in denial of the application and that the Labor Commissioner may also assess a penalty for failure to comply with registration requirements pursuant to Labor Code §2678(a)(2).

Chung: Same comments as AIWA but also request the addition of civil penalties for failure to

comply with registration requirements.

Seville: Same comments as AIWA.

Bas: Same comments as AIWA.

MODIFICATION TO REGULATION: Subsection (a) is modified to include a copy of a revised "Application for Registration Garment Manufacturing Industry" [DLSE 810 (REV. 03/02)] form. It also adds the requirement that the applicant provide the social security number(s) and California driver's license number(s) of the owner(s), partners, officers, directors, substantial shareholders, members of a limited liability corporation and managers and supervisors who directly or indirectly control the wages, hours and working conditions of the applicant's employees. Subsection (c) has been added and provides: "The residence address, social security numbers, and California driver's license numbers listed in the application for registration pursuant to subsections (a)(3), (4), (6), (7), (13), (14) and (15) above, are for the Labor Commissioner's use for licensing and law enforcement purposes, and are confidential and shall not be disclosed to any person other than an employee of a law enforcement agency, except if required by court order or if necessary for the prosecution, by the Labor Commissioner, of any judicial or administrative proceeding."

Comments Received Following Modification --
Levy: The proposed regulations requiring residence addresses for officers, directors and principal shareholders are an invasion of privacy and may well be unconstitutional.

Simmons: The modified regulations are an even greater intrusion on the privacy rights of individuals than were the original. The inclusion of the requirement that the social security numbers and California driver's license numbers be disclosed is contrary to the public interest in guarding against misuse of personal information and identity theft. In particular the legislature has enacted AB 655 to create further safeguards against misuse of social security numbers. This additional information is not necessary to the enforcement of the statute. The confidentiality provisions of subsection (c) are insufficient due to the fact that there are broadly worded exceptions which leave the individuals unsure of how safe their private information is.

Gill: The requirement that information regarding managers and supervisors be disclosed serves no purpose in this legislation and makes it extremely difficult to hire and manage employees. The requirement that information regarding officers, directors or shareholders be provided is not necessary and would have a chilling effect on investment in California. There is no provision in AB 633 for "piercing the corporate shield" and since a corporation's liabilities do not normally extend to its officers, directors or shareholders, this information should not be required. The requirement that information be disclosed regarding anyone "exercising direct or indirect control..." is far too broad and too vague. The provision that the information on the application would be confidential unless needed in a proceeding does not go far enough to

address the privacy concerns of the individuals. Information such as addresses will be made public if there is a hearing.

Metchek: Requiring the names and addresses of co-owners of a business should only be required of contractors and only for privately held, and not publicly held, businesses. Requiring the names and addresses of officers and directors should only be required in cases of privately owned contractors and manufacturers. Residence addresses of non-owners should not be required. Requiring the residence addresses of substantial shareholders should only be required in cases of privately owned contractors.

Harris: The new requirement that the residence addresses, driver's licenses and social security numbers of an employer's management workers be submitted to the DLSE is unreasonable and without any clear purpose.

APALC: We object to the addition of subsection (c) which makes the addresses and other information regarding registration applicants confidential. Since closure and relocation are a continuing problem in the garment industry and workers are unable to locate those responsible for payment, this information is necessary to enable workers to locate the business if they choose to pursue claims without the assistance of the Labor Commissioner, which sometimes is an inadequate avenue for relief.

Response: As recognized by many of the comments submitted to the Labor Commissioner, many garment contractors and manufacturers close their businesses, change names and move, fairly quickly, leaving their employees without information to hold a responsible party liable for unpaid wages. AB 633 provides for guarantor liability and successor liability. In order to enforce these provisions, as well as performing its licensing function in a meaningful way, this information is essential. Due to the fact that responsible parties are difficult to locate after businesses close or change names, the additional information concerning the residence addresses, social security numbers and driver's license numbers is needed. The definition of "employer" in Industrial Welfare Commission Wage Order 1 which governs manufacturing provides that "Employer means any persons...who directly or indirectly, or through an agent or any other person, employs or exercises control over the wages, hours or working conditions of any person." In any given situation, there may be more than one employer and managers, directors, and supervisors may fit that definition and therefore, this information is necessary.
With respect to AIWA' suggested modification of subsection (b), persons applying for garment registration includes persons applying for renewal of registration. Therefore, the additional language suggested by AIWA is unnecessary. Also, AIWA's suggestion for a new subsection dealing with incomplete applications is unnecessary in that an incomplete application will be denied or returned as a matter of course. A civil penalty already exists for failure to comply with registration requirements, including confiscation.

The confidentiality provisions of §13634(c) is in answer to the employers' concerns

regarding the residence addresses, etc. of the individuals, contractors and manufacturers being made public. This provisions is a compromise between the need for this information to enforce the statute, given the fact that garment businesses have a history, recognized by almost all people commenting, of relocating, renaming and transferring assets to avoid wage liability, and the legitimate concerns of individuals that their private information not be made public. These confidentiality provisions will allow the Labor Commissioner to use this necessary information for legitimate law enforcement and licensing purposes, while protecting this information from unnecessary public disclosure.

§13635. Registration and Examination Fees.

Simmons: The registration fees established by this regulation are excessive. The minimum fee under the new structure is two and one-half times the maximum fee under the old structure. This increase in fees will make it cost prohibitive for small businesses and those with marginal earnings to enter or remain in the industry. The fee structure should be amended to provide for a $250 fee for contractors with gross receipts under one million dollars, a $350 fee for contractors with gross receipts between one and two million dollars, and a $500 fee for contractors with gross receipts over two million dollars. Registration fees for manufacturers should be similarly modified. Also, applicants who do not want to disclose their gross receipts should be permitted to pay the maximum registration fee without making such a disclosure.

Raffi and Kevinx: The fees are too high.

Zumwalt: The substantial increase in registration fees for manufacturers will have a significant adverse impact.

Anonymous: The fees are excessive. The maximum registration fee for manufacturers, set at $2,500, should only apply to manufacturers with revenues in excess of $20 million.

Libaire: The fee structure should be revised. Under the regulation, manufacturers will face a sharp increase from the current $250 registration fee. This increase is particularly unfair to small artisan shops that do their own design and manufacturing.

MODIFICATION TO REGULATION: No changes were made to the proposed registration fees, except for minor changes in wording. However, Subsection (f) was modified to lower the examination fee from $50 to $25.

Comments Received Following Modification--

Gill: The $750 minimum fee for manufacturers is too high. A designer that wants to manufacture and sell a small amount of garments to a local boutique must register, under the statute, when she either starts to make those garments herself or when she contracts with a

contractor to make them. There will have been no sales and no certainty of sales before the registration requirement attaches. This will discourage small businesses from starting up. Also, there has been no demonstration that new manufacturers present risks that increase enforcement costs for the Labor Commissioner. Contractors, whose registration fees are lower, are more likely to violate the law.

Harris: A $750 for a start-up or small existing manufacturer is unfair and without justification. There are hundreds of firms with just one or two employees that will be forced to pay this amount simply because they contract out a very modest amount of production. Contractors pose a much greater risk of violating wage and hour laws, yet their registration fees are lower. The fee proposed for manufacturers will serve as a barrier to law abiding individuals who seek to start a business in the California apparel industry.

Response: The proposed fees are expressly authorized by Labor Code §2675(a)(5). Also, this statute requires that the total fees collected shall be sufficient to defray the Labor Commissioner's costs of administering the laws related to garment manufacturing. The fee structure established by this proposed regulation was designed to recover as nearly as possible the exact amount required for this purpose. Lowering the proposed fees for contractors and manufacturers in the manner suggested by certain persons who commented on this regulation would fail to provide sufficient funds for the administration of these laws. Suggestions to lower fees charged to new or small manufacturers would require, in order to maintain the same level of funding from total fees collected, concomitant increases in fees charged to new or small contractors, businesses that are generally lesser capitalized or less likely to easily absorb fee increases than manufacturers. Also, since AB 633 expressly requires all persons who contract with contractors for the performance of garment manufacturing operations to act as the guarantors of the contractor's employees' wages, all manufacturers - - whether new or established, small or large, should be sufficiently capitalized so as to assume this new legal obligation. In view of that obligation to pay the minimum wages and overtime that may be owed to another employer's employees, every manufacturer, including those that are newly registered and those that are relatively small businesses, should be sufficiently capitalized so as to easily afford the minimum $750 registration fee. Any manufacturer that would be discouraged from starting or remaining in business solely because of this minimum registration fee would be extraordinarily unlikely to possess the means to satisfy its obligations as a wage guarantor.

§13635.1. Filing Schedule for Applications.

Simmons: The Labor Commissioner is given too much time to review pending applications, and applicants are given too little time to correct problems with an application. Time limits should be changed as follows: subsection (a), the time for the Labor Commissioner's initial screening of the application for completeness, should be changed from 30 days to 14 days; subsection (b), the time for the applicant to provide complete information on a returned incomplete application, should be changed from 60 to 30 days [Note: this proposal appears to contradict the stated reason

for recommending the change.]; and subsections (c) and (d), the time for the Labor Commissioner to act on a complete application, should be changed from 60 to 30 days. Also, if an application is rejected under subsection (b) because of the applicant's failure, within the specified time, to complete the application, the requirement that any subsequent application be accompanied by the required registration fee should be amended to allow for a re-application fee equal to a small percentage of the regular registration fee.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised, except for correcting a minor clerical error.)-- None.

Response: The time limits set out in Simmons' proposal are unrealistic. The Labor Commissioner's Licensing Unit must spend a substantial amount of time reviewing each application and performing or directing the necessary investigation to ensure that the applicant possesses the requisite character, competency, and responsibility for registration, as required by Labor Code §2675(a)(2). The time limits set out in the proposed regulation are consistent with Labor Code §2675(h), under which the Labor Commissioner is required to mail to each registrant, at least 90 days prior to the expiration of the registrant's registration, a renewal notice with all necessary application forms and complete instructions for registration renewal. Under the proposed regulation's time limits, the Commissioner has up to 30 days to determine whether the application is complete, and if it is, up to 60 days from the date of making that determination to reach a decision on the completed application. From start to finish, this 90 day period (30 plus 60 days) will allow the Labor Commissioner to reach a final decision on the application prior to expiration of the registration. Applicants who initially fail to submit a completed application, are adequately protected by Labor Code §2675.2, under which the Labor Commissioner may extend a registration for no more than 90 days if the applicant submits a completed application at least 30 days prior to expiration of registration. Under the proposed regulation's time limits, an applicant will be notified within 30 days of submitting its application for registration if that application is incomplete, so as to provide the applicant with sufficient time to submit a complete application within the time required by §2675.2 to qualify for a extension of its registration. Finally, the suggestion that applicants who fail to perfect a completed application within the allowable time be permitted to subsequently re-apply without paying the full application fee fails to apprehend that the "re-application" is, in fact, a new application that will require the applicant to submit new information on a new application, rather than merely resubmitting the information previously provided on the previously submitted application. Resubmission after the expiration of the time limit for perfecting an incomplete application would be inappropriate as it would mean that the Labor Commissioner would be making a decision on whether to grant an application on the basis of potentially outdated and no longer accurate information. In any event, there is no reason why an applicant should need more than 60 days to complete an incomplete application, so there is no reason why an applicant, other than through lack of diligence, would end up in the situation of having to submit a new application under these circumstances.

§13636. Registration Certificate.

AIWA: The following language should be included in the regulation: "Certificates obtained by falsifying information or failing to disclose materials facts shall be void and the registrant is deemed unregistered."

Comments Received Following the Issuance of the Revised Regulations (Note: neither the original nor the modified versions of the proposed text would have amended this section; nevertheless, we respond below to the comment received from AIWA on the originally proposed text.)—None.

Response: This regulation, which provides that the registration certificate is valid for a period of one year, is non-transferrable, and is valid only for the address(es) shown on its face, was in existence prior to the adoption of AB 633, and has not been changed in any manner in these proposed regulations. AIWA's proposed addition is unwise on a policy level, in that contractors and manufacturers should be entitled to rely on a seemingly valid registration certificate, or on information on the Labor Commissioner's website listing of licensed manufacturers and contractors, in order to determine if a contractor or manufacturer with which they contemplate doing business is registered. If AIWA means that the registration certificate is void *ab initio* as a consequence of having provided false information on an application for registration, the other businesses that entered into contracts with this entity would be subject to various drastic legal consequences that flow from contracting with an unregistered contractor or manufacturer. Instead, we believe that these other businesses should be able to rely on the certificate unless and until it has expired or has been formally revoked by the Labor Commissioner. Even if AIWA's proposal would only make the certificate prospectively void from the time the Labor Commissioner discovered that it was obtained by false information, the proposal would still conflict with the legal requirement for notice and an opportunity for a hearing prior to revocation of the registration. A duly issued certificate of registration cannot be declared "void" unless the registration is revoked upon notice with an opportunity for a hearing on the proposed revocation.

§13637. Amended Certificate.

AIWA: The regulation should provide that if the registrant does not notify Labor Commissioner as to each location not already listed on the registration certificate where employees will be engaged in garment manufacturing, that failure to provide that information shall be grounds for revocation of registration.

Chung: The current regulation lacks an explicit and meaningful sanction for noncompliance, so that entities engaged in garment manufacturing have a real incentive to provide the information. Therefore, clear language is required that if the information is not provided, the application for registration or renewal will be denied.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: These changes proposed by AIWA and Chung are not necessary. Regulation 13636 provides that the garment certificate is non-transferable and is valid only for the address shown on the face of the certificate. Therefore, if the new address is not shown on the certificate, the contractor or manufacturer will not be deemed registered at that location and therefore would be engaging in unlicensed garment manufacturing activity and have all the legal consequences of that. And in addition, the broad reasons for a revocation of registration certificate would include providing false information or incomplete information.

§13638. Duplicate Certificate.

No comments.

§13639. Penalty Assessment.

AIWA: To ensure that penalties are not assessed at a low level because few employees are present at the time of inspection, this section should read that the penalties should be assessed, computing the method which results in the greatest penalty.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: This section provides for penalties in three different ways, which gives the Labor Commissioner some discretion as to how to prove the violation and the amount of the penalty. To require that the method that results in the greatest penalty must be used would take away that discretion. We believe the Labor Commissioner should retain this discretion.

§13640. Notice of Penalty Assessment and Right to Hearing.

No comments.

§13641. Bonds for Continued Registration.

No comments.

§13642. Return of Registration Bond.

No comments.

§13643. Action Against Registration Bond.

No comments.

§13644. Bonds for Filing an Appeal from an Order, Decision or Award.

AIWA: The language dealing with the conditions placed on the bond or undertaking is confusing as presently drafted, and should be amended to more clearly state the conditions on the bond or undertaking. Also, the regulation should state that no release of claims shall be effective until the employee receives all amounts specified in the settlement agreement, release or other document providing for payment.

Simmons: This regulation encroaches on the authority of the Industrial Welfare Commission ("IWC"), in that the IWC requires that a bond be posted in an amount equal to the Labor Commissioner's award when an employer files a de novo appeal. By requiring a bond equal to one and one-half times the Labor Commissioner's award, this regulation violates equal protection by holding garment industry employers to a different standard which penalizes employers who seek to exercise the right to appeal.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised, except for a minor clerical correction.)--

APALC: The revisions suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Response: The conditions on the bond, set out in this regulation, precisely mirror the language used by the Legislature in describing the conditions on a bond that must be filed by an employer that files an appeal of an order, decision or award of the Labor Commissioner under Labor Code §98.2(b). The Labor Commissioner does not believe that language is confusing or that it needs any clarification n order to be understood. AIWA's proposal to add language postponing the effectiveness of any release of claims until the employee receives all amounts specified in the settlement agreement or release is unnecessary, in that the appeal bond or undertaking, which is a "condition precedent for the filing of an appeal," pursuant to Labor Code §2673.1(g), will serve as adequate that the employee will receive the full proceeds to which he or she is entitled under any settlement. Simmons comments are incorrect statements of the law. The general requirement -- not specific to cases involving garment contractors -- under which any employer that files an appeal from an order, decision or award of the Labor Commissioner must post a bond or undertaking equal to the amount of the order, decision or award was created by the Legislature, not the IWC, and is found at Labor Code §98.2(c). That general requirement for the posting of an appeal bond was part of AB 2509 (Statutes of 2000, Chapter 876), a law that was passed one year after AB 633. There is no indication whatsoever that the Legislature intended to repeal the provisions found at Labor Code §2673.1(g) governing appeal bonds and undertakings

in appeals filed pursuant to AB 633, which are, of course, specific to wage claims filed by garment contractor's employees. As to the higher amount that must be posted pursuant to Labor Code §2673.1 (one and one-half times the order, decision or award) than that required under §98.2 (an amount equal to the order, decision or award), the proposed regulation merely tracks the statutory requirement. As to the alleged constitutional infirmity, there is certainly, in view of the staggering levels of non-compliance with minimum labor standards in the garment industry, a rational basis for treating garment industry employers differently than other employers. Finally, the requirement for posting an amount equal to one and a half times the order, decision or award is intended to provide a source of recovery for attorney's fees that the court must award against the employer/appellant if the employee prevails on the appeal pursuant to Labor Code §2673.1(h). A bond or undertaking that does not exceed the amount of the order, decision or award would fail to provide a source of recovery for these statutorily mandated attorney's fees.

§13645. Periods of Revocation.

AIWA: Subsection (b) should be reworded to say that an application for a new registration will be denied unless all judgments, settlement agreements or any other agreement to pay or resolve claims for unpaid wages have been satisfied.

Simmons: This section is unduly harsh on employers. It is also vague in that it does not define overtime or minimum wage violations to exclude inadvertent miscalculations or small errors in wage payments or violations committed by others. Small violations should not be penalized on par with substantial violations of minimum wage and overtime. The penalty would be triggered whenever an employer mistakenly but in good faith treats an employee as exempt. The lightest penalty is a suspension of registration for thirty (30) days; however, this would have the effect of putting the business out of business and the employees without work, and is unwarranted for violations that are rare or minor.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: This section already precludes registration following expiration of a revocation unless these judgments or settlements are satisfied. As for Simmons' comments, this regulation sets out revocation periods under Labor Code §2679(b), which provides that the Labor Commissioner "may revoke the registration of any person for any period ranging from 30 days to one year upon a third or subsequent violation within a two-year period . . . ." Thus, any employer whose registration is subject to revocation under this provision is an employer who has committed multiple violations of the laws governing garment manufacturing within a relatively short period of time. Unfortunately, the threat of revocation of registration is often the only means of compelling such an employer to comply with these laws, and revocation is the often the only means of preventing a recidivist from continuing to engage in unlawful practices that harm employees and law abiding employers. As to those employers who would argue that revocation

is not appropriate because the violations were inadvertent or not willful, such arguments can be raised on a case by case basis in revocation hearings.

§13646. Hearings to Deny an Application and to Revoke or Suspend Registration.

AIWA: Subsection (a) should be changed to read, "denial of an application for registration or renewal and revocation, suspension or a conditioning of registration." The changes are necessary to make subsection (a) consistent with subsections (b) and (c). Subsection (f) should be changed so it reads that the Division may proceed by default without scheduling a hearing *because* the burden of proof is on the respondent as opposed to *where* the burden of proof is on the respondent. Subsection (j) should be amended to provide that the hearing shall be scheduled no later than sixty (60) days from the date of service of the accusation. A time limit needs to be set for when the hearing needs to be heard.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: Each application for registration either for the initial registration or renewal is viewed by the Labor Commissioner as an application for registration. Although the hearing may result in a condition placed upon the registration, the hearing is actually only held to deny an application or to revoke or suspend registration. The burden of proof is on the Labor Commissioner in a proceeding to revoke a registration, and on the applicant in a proceeding to deny an application for an initial registration or the renewal of a registration. AIWA is correct in suggesting that the reason the Labor Commissioner may proceed by default on a statement of issues (as opposed to an accusation) is *because* in such a proceeding, the burden of proof is on the respondent. However, the language of the proposed regulation does not in any way contradict that. The Labor Commissioner will prosecute these actions as expeditiously as possible. However, due to potential problems regarding proof and availability of witnesses, it is not wise to put a time limit on scheduling the hearing.

§13647. Registration After Revocation.

No comments.

§13648. Confiscation.

No comments.

§13649. Disposition of Confiscated Goods.

Simmons: This section should be amended to provide that the confiscated equipment should be auctioned to current registrants in the industry to allow small businesses access to affordable

used equipment.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: There is no reason to limit those allowed to bid on the used equipment. Since the funds derived from the auction are to be deposited into an account for the payment of back wages and taxes pursuant to Labor Code §2680(c), auctions should be open to anyone to maximize the proceeds.

§13650. Hearings on Appeals of Penalty Assessments or Confiscations.

No comments.

§ **13651. Conduct of Hearing: Rules of Evidence.**

AIWA: Before subsection (b) on hearsay evidence, another subsection should be inserted that reads: "Failure of a garment manufacturer or contractor to produce books and records within 10 days of a request by the Labor Commissioner for inspection and/or copying of books and records shall result in the inadmissibility at the hearing of any records not produced."

Levy: A manufacturer should be able to protect as a "trade secret" the price per garment it is paying a contractor and the information should not be disclosed to other manufacturers.

Levy-S: When DLSE conducts hearings, pricing should be confidential, as it is a trade secret.
Chung: Same comment as AIWA.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)--

APALC: The revisions suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Response: AIWA's suggestion re: non-admissibility would create a inflexible rule that would often make it more difficult for the Labor Commissioner to prove facts that are relevant and essential to establishing the facts necessary to uphold a penalty citation or confiscation, or a revocation of registration or denial or an application for registration. If the records were subpoenaed, there was a good reason why that was so--namely, the Labor Commissioner would have issued the subpoena believing that the records would contain relevant evidence. This suggestion would deprive the Labor Commissioner of subpoenaed evidence whenever it is not timely produced, and would potentially encourage employers subject to a subpoena duces tecum to deliberately delay production of any records that might be incriminating. The absence of

automatic non-admissibility language would not preclude the Labor Commissioner, in its prosecution of citation, confiscation or licensing cases, to move for the exclusion of untimely produced evidence when appropriate, on a case-by-case basis. Levy's contention that pricing is a trade secret, and that any evidence or testimony about pricing should be confidential, is belied by the fact that since 1980, Labor Code §2673 has required all employers engaged in garment manufacturing to maintain written records that, among other things, show the "price per unit agreed to between the contractor and the manufacturer." Failure to comply with Labor Code §2673 subjects an employer to penalties pursuant to Labor Code §2678(a)(3). Furthermore, failure to comply with §2678 could lead the Labor Commissioner to conclude that the employer lacks the character, competency, or responsibility that is required for registration under Labor Code §2675(a)(2). More recently, with the enactment of AB 633, a manufacturer is deemed to act in "bad faith" when it is established that it "knew or reasonably should have known that the price set for the work was insufficient to cover the minimum wage and overtime pay owed by the contractor." (Labor Code §2673.1(e) and (f).) Such a manufacturer could face licensing consequences under §2675(a)(2). The inescapable conclusion from a review of these statutes is that pricing issues may be central to a citation appeal hearing or licensing hearing, that the statutes at issue treat pricing as a matter that is not a trade secret or entitled to any sort of confidentiality, and that to adopt such a regulation would be inconsistent with these statutes, and at odds with the public interest in ensuring that employers in the garment industry comply with California wage and hour laws. Finally, the notion that pricing could be deemed confidential so as to protect documents or testimony regarding pricing from public disclosure is at odds with Labor Code §2673.1(d)(1), which governs procedures for processing employee wage claims under AB 633, and provides: "At the request of any party, the Labor Commissioner shall provide to that party copies of all books and records received by the Labor Commissioner in conducting its investigation." Admittedly, licensing and citation appeal hearings are not governed by the procedures of §2673.1(d)(1), but to deem such information confidential when presented in the context of one sort of adversary hearing, but protected from disclosure when presented in the context of another sort of adversary hearing, makes very little sense.

§13652. Rights of Parties at Hearing; Taking of Evidence; and Rules of Procedure.

No comments.

§13653. Role of the Hearing Officer.

No comments.

§13654. Issuance of Subpoenas.

No comments.

§13655. Determination of Guarantor's Proportionate Share of Liability.

AIWA: The regulation gives the Labor Commissioner discretion to use any one of certain specified methods for determining each guarantor's proportionate share. The Labor Commissioner should not have the discretion to use a method that provides for less than the most accurate results, so the regulation should instead require use of the method which would most accurately determine proportionate share. We support subsection (d), which allows the Labor Commissioner to rely on claimants' testimony. However, that subsection, which now provides for this alternative method for determining proportionate liability "in the absence of records," should be revised to allow for use of that method in the absence of "complete, accurate and reliable records."

Chung: Same comment as AIWA re: subsection (d).

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)--

APALC: The revisions suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Response: The purpose of this proposed regulation is precisely to give the Labor Commissioner the discretion to use any one of the specified methods for determining each guarantor's proportionate share. The statute does not define the term "proportionate share" or specify a particular methodology that must be used to ascertain each guarantor's proportionate share, other than indicating that it is to be measured by reference to the work performed by the contractor's employees at the same worksite during the same pay period. Thus, of the various methodologies set out in the proposed regulation, there is no methodology that is inherently more or less "accurate" than another. Rather, all of the proposed methodologies (gross sales/hours worked/garments produced) are acceptable means of determining proportionate share, and it is left to the discretion of the Labor Commissioner to decide which method to use. This will allow the Labor Commissioner to utilize whichever methodology is supported by the most complete and most readily obtainable evidence, which will undoubtedly lead to the use of different methodologies in different cases. The suggestion to amend subsection (d) to allow for the use of claimant's testimony to establish proportionate share in the absence of "complete, accurate and reliable records" is unnecessary, in that subsection (a) already provides "in that event that any necessary records are not produced, incomplete, or inaccurate, the Labor Commissioner may rely on . . . the testimony of claimants" to determine proportionate share.

§13656. Amounts Included in Assessment of Wages Owed and Order, Decision or Award.

Levy: This section exceeds the statutory requirement that the wage guarantor pay its proportionate share of unpaid minimum wage and overtime only, by including an award of

interest against the guarantor. This section should not require the wage guarantor to pay its proportionate share of interest.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)-- None.

Response: Civil Code §3287 provides: "Every person who is entitled to recover damages certain or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day..." The section has been interpreted by the courts to include in the definition of damages amounts recoverable as wrongfully withheld wages. See, e.g. *Currie v. W.C.A.B.* (2001) 24 Cal.4th 1109. Therefore, interest is to be added as a matter of law and there is no need for an express statutory provision.

§13657. Attorney's Fees and Costs.

AIWA: We support this regulation--it is an appropriate implementation of the statutory fee provision in Labor Code §2673.1(f). It gives clear direction to all parties about how the fee and cost provisions will operate, and is consistent with California law on prevailing party status and fee shifting. However, subsection (b), which sets out a procedure whereby the contractor or guarantor may deposit the full amount of the assessment with the Labor Commissioner at the meet-and-confer conference for immediate and unconditional payment to the employee, should be amended to require that the amount deposited with the Labor Commissioner be in the form of a cashier's check or money order, so as to ensure that there will be no problem with the form of payment of the assessment.

Simmons: The definition of "prevailing party" for the purpose of imposing attorney's fees goes beyond the Labor Commissioner's statutory authority, deprives employers of due process by creating a one-sided windfall for employees that discourages employers from filing any appeals, and conflicts with a recent decision of the court of appeal, *Smith v. Rae-Venter Law Group*, by allowing the imposition of attorney's fees against an employer who successfully appeals the initial determination.

Levy: If the employer rejects the assessment at the meet-and-confer, the employee should be considered the prevailing party only if s/he is awarded more money by the Labor Commissioner at the hearing. If the employee rejects the assessment at the meet-and-confer, the contractor or manufacturer should not be required to post the full amount of the assessment so long as the contractor or manufacturer agrees to pay the amount of the assessment or proportionate share thereof.

Levy-S: If the employee rejects the assessment at the meet-and-confer, the employee should be considered the prevailing party only if s/he is awarded more money by the Labor Commissioner

at the hearing.

Chung: Supports the regulation--it appropriately implements statutory fee provision at Labor Code §2673.1(f).

Bates: The definition of "prevailing party" conflicts with judicial interpretations of that phrase, penalizes employers for exercising the right to a hearing or the right to appeal, and is one-sided in favor of employees.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)--

APALC: The revisions suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Levy: Labor Commissioner did not amend this regulation following the initial comment period, so comments that were made previously (see above) in opposition to certain aspects of this regulation are reiterated.

Response: AIWA's suggestion that garment contractors and guarantors be required to make payment of the amounts found due by the Labor Commissioner at the meet-and-confer conference in the form of a cashier's check or money order -- as opposed to any other form of bank draft or check -- is impractical, in that Labor Code §2673.1(d)(3) provides that "the Labor Commissioner shall present his or her findings and assessment of the amount of wages owed and each guarantor's proportionate share thereof to the parties at the meet-and-confer conference and shall make a demand for payment of the amount of the assessment." It would be impossible for the parties attending the meet-and-confer conference to know, in advance of the conference, the amount assessed against each party, and thus, impossible for those parties to bring cashier's checks or money orders in the correct amount to the conference. It would be impractical to continue the conference, after the presentation of the findings and assessment, to give these parties sufficient time to obtain cashier's checks and money orders so that payment could be made at the meet-and-confer conference. Turning to the comments regarding the definition of "prevailing party", and the circumstances under which a wage claimant is entitled to attorney's fees, we start with the language of Labor Code §2673.1(f): "If either the contractor or guarantor refuses to pay the assessment, and the employee prevails at the hearing, the party that refuses to pay shall pay the employee's reasonable attorney's fees and costs. If the employee rejects the assessment of the Labor Commissioner, and prevails at the hearing, the employer shall pay the employee's reasonable attorney's fees and costs." Simmons, Levy and Bates suggest that an employee should not be deemed the "prevailing party" unless he or she obtains a result at the hearing that is more favorable than the amount that was assessed in the findings and assessment. But there is no mechanism for compelling the payment of the amounts initially found due in the findings and assessment, regardless of whether it is a defendant that "refuses to pay" the

assessment or the claimant who "rejects the assessment." Rather, "[i]f no resolution is reached, the Labor Commissioner shall, at the meet-and-confer conference, set the matter for hearing." (Labor Code §2673.1(d)(3).) So if a contractor or guarantor refuses to pay the assessment or if the claimant rejects the assessment, and the case is not settled at the meet-and-confer conference, there is no alternative but to set the matter for hearing. Since the claimant had no legal entitlement to collect any of the amounts in dispute from the defendants prior to the hearing, it is apparent that an order, decision or award following the hearing (or pursuant to stipulation) which vests the claimant with a legal right to collect any amount from the defendant(s) would make the claimant the "prevailing party." This "net recovery" basis for determining whether a claimant is the "prevailing party" for the purpose of determining entitlement to attorney's fees is precisely the method followed in de novo court appeals from Labor Commissioner orders, decisions or awards pursuant to Labor Code §98.2(c). (*Cardenas v. Mission Industries* (1991) 226 Cal.App.3d 952.) Simmons' reference to a contrary decision in *Smith v. Rae-Venter Law Group* should be disregarded, in that review of that decision has been granted by the California Supreme Court, before which the case is now pending. In any event, the question of what constitutes "an unsuccessful appeal" under Labor Code §98.2(c) is not necessarily determinative of how "prevailing party" ought to be defined in this regulation. The assessment results from an investigation conducted by the Labor Commissioner pursuant to Labor Code §2673.1(d)(3) prior to the meet-and-confer conference. In this regard, AB 633 set up a very different procedure than that followed in any other sort of unpaid wage claim under Labor Code §98, in that in no other type of wage claim does the Labor Commissioner conduct its own independent investigation apart from the adjudicatory hearing. The purpose of this independent investigation is to determine what is owed and who owes what, so as to expedite the collection of unpaid wages and avoid resort to further administrative or judicial proceedings. Any definition of "prevailing party" other than that set out in the proposed regulation would undercut the purpose of the Labor Commissioner's independent investigation.

§13658. Labor Commissioner's Enforcement of Wage Guarantee.

AIWA: The last sentence of subdivision (d) should read, "within thirty days after the close of the hearing, the hearing officer shall issue and deliver to the parties a written recommended disposition of the case." The section otherwise does not include a provision of service of the decision.

Levy: The price the manufacturer pays the contractor is a trade secret and while it must be disclosed to the Labor Commissioner, it should not be disclosed to other manufacturers or the employees. In addition, there needs to be a mechanism for the manufacturer and the contractor to present their case, both prior to and at the meet and confer, prior to the Labor Commissioner presenting his or her assessment.

Comments Received Following the Issuance of the Revised Regulations (Note: this particular regulation was not revised.)--

Metchek: The price per garment a manufacturer is paying a contractor is a trade secret and the information should not be disclosed to other manufacturers. There should be a mechanism for private disclosure to the hearing officer only.

Response: In response to AIWA's comment, the hearing under subdivision (d) is an investigative hearing that is conducted for the sole purpose of assisting the Labor Commissioner in deciding whether to initiate a civil action against the contractor and guarantors pursuant to Labor Code §2673.1(j). The proposed regulation provides that the hearing officer's recommended disposition shall have no res judicata or collateral estoppel effect, and shall be entitled to no weight in any subsequently filed civil action. The Labor Commissioner may choose to follow or disregard the written recommendation; and whatever the recommendation may be, the Labor Commissioner has complete prosecutorial discretion in deciding whether or not to file a civil action. Thus, no purpose would be served by inserting a provision to require the Labor Commissioner to serve any outside party with a copy of the hearing officer's recommended disposition. Turning to the other comments and the issue of whether pricing is a trade secret that should be kept confidential from other manufacturers and employees, we incorporate by reference the response to similar comments regarding regulation 13651 above. To be sure, in contrast to the procedures that govern an adversary hearing (such as a wage adjudication hearing, a licensing hearing, or a citation appeal hearing), as a general matter there is no law or regulation that would prohibit an investigative hearing officer from questioning a witness or taking evidence in a proceeding that is closed to parties other than the party being questioned and the Labor Commissioner. Subsection (d) of the proposed regulation expressly states that the provisions of Govt. Code sections 11400, *et seq.* are not applicable to this investigative hearing, and that the investigative hearing officer has discretion as to whether or not to permit the participation of a party. It should therefore be left to the discretion of the investigative hearing officer to decide in each case, as appropriate, whether to exclude other parties from the hearing and whether to accept certain evidence in a closed proceeding. Finally, in response to Levy's suggestion for a mechanism to allow the contractor and manufacturers to present their case to the Labor Commissioner prior to the presentation of the findings at the meet-and-confer conference, there is no need to establish a formal mechanism through this regulation in that the assigned investigator will of course take appropriate steps to meet with, and obtain evidence from the contractor and manufacturer prior to the meet-and-confer, at which time they would be able to "present their case."

§13659. Information Contained in Contracts Between Manufacturers and Contractors, and on Itemized Wage Statements Provided to Employees.

AIWA: We strongly support the requirements for detailed information in contracts and on itemized wage statements, as this will provide necessary information to garment workers as to the identity of guarantors and the volume of work done for each particular guarantor. Without this information, workers are at a disadvantage in enforcing their rights to wage payment. Subsection (a), which requires every applicant for registration to certify that it will maintain and

make available to the Labor Commissioner written contracts for the manufacture of garments, and that such contracts shall contain certain specified information, should be amended to expressly require the same certification by all applicants for renewal of registration. Subsection (c), which provides that the failure to provide certain specified information on employees' itemized wage statements shall constitute grounds for revocation of registration or denial of an application for registration, should be amended to expressly provide that such failure shall constitute grounds for denial of an application for renewal of registration. The requirement to list "the name(s) of any manufacturer(s) for whom the contractor performed any garment manufacturing operations" should be amended to require "the name(s) of any and all manufacturer(s)." Finally, the regulation should authorize the Labor Commissioner to assess a penalty for failure to comply with the registration requirements of this section, pursuant to Labor Code §2678(a)(2).

Simmons: Most business in the industry is now "done on a handshake," and the requirement that all agreements to manufacture garments be in writing and contain certain specified details violates the constitutional right of freedom to contract. In particular, the requirement that any changes from the original contract also be in writing is a odds with the practical realities of doing business, in that the specifics of an order are nearly always modified in minor ways during the production process. Also, the requirement at subsection (c) that contractors include certain specified information on the itemized wage statements attached to employees' paychecks -- the names of all manufacturers for whom the contractor performed work during the pay period, and the percentage of the employee's work time during the pay period that the employee performed manufacturing operations for the named manufacturer - - is unduly burdensome, in that employees may work on a variety of different projects, for different manufacturers, in any given day. Moreover, this requirement exceeds the Labor Commissioner's authority in that it is not authorized by statute, and is inconsistent with the provisions of Labor Code §226 and the IWC wage orders.

Levy: Subsection (a), which requires the use of written contracts, and that certain information be included in each contract between a manufacturer and contractor, should be changed so that certain specified information (the manufacturer's and contractor's correct legal identity and any fictitious business names; business address and telephone numbers; garment registration certificate number and date of expiration; and workers' compensation carrier, policy number and date of expiration) need not be listed in every contract (or "purchase order"), but instead, could be listed on a "blanket agreement" or on the back of the contractor's invoice for the particular purchase order. Subsection (c) should be deleted, as manufacturers could not possibly monitor the wage statements that contractors provide to their employees, and there is a risk that contractors will provide inaccurate information to their employees, particularly information regarding the percentages of work performed on behalf of various manufacturers. This regulation would subject manufacturers to excessive proportionate liability on the basis of inaccurate information placed on the pay stubs by contractors.

Levy-S: Same comments as above. It will be impossible for contractors to accurately record what percentage of time each worker is performing work on behalf of each manufacturer, as there may be occasions when different portions of a contractor's employees are doing work for different manufacturers. Manufacturers will be at a disadvantage in trying to rebut any such inaccurate information on the pay stubs, because of the difficulties of rebutting written documentation. Instead of requiring this information to be listed on the employee's pay stubs, contractors and manufacturers should be required to provide the Labor Commissioner with a list, every 90 days, of the names of any businesses engaged in garment manufacturing that they contracted with in the past 90 days. That information is now required annually on the application for registration. It is not necessary to have this information listed on employee pay stubs.

Gill: Subsection (c) is overly burdensome. Information regarding the identities of manufacturers for whom the contractor performs work is already listed on the applications for registration that were filed by that contractor and manufacturers. The Labor Commissioner can determine each manufacturer's proportionate share of liability by reviewing those applications, and then obtaining specific information from these manufacturers.

Earl Jean: The requirement, contained in subsection (c), that contractors list of the percentage of time each of its employees spends working on each manufacturer's products, would impose a huge burden on contractors, in that typically, the percentages will vary from employee to employee, making it nearly impossible for contractors to do anything but guess at the percentages. Also, the requirement for a percentage allocation of each employee's time is not necessary to interpret or enforce the wage guarantee established by AB 633, which permits the allocation of proportionate liability to be made on a collective, rather than individual basis, as set forth in proposed §13655. Furthermore, the requirement that contractors list, on pay stubs provided to their employees, the identity of the manufacturers on whose behalf they perform garment manufacturing operations is inconsistent with the Uniform Trade Secrets Act (Civil Code §3426, et seq.), in that one of the most important trade secrets of a manufacturer is the identity of the contractors with which it does business. By requiring the publication of this information on employee pay stubs, manufacturers will lose the ability to keep this information secret. Finally, requiring the contractor to insert, on its pay stubs, information about the identity of manufacturers on whose behalf the contractor performs work will not effectuate the purposes of AB 633, and therefore is unnecessary.

Forever 21: Same comments as Earl Jean. Also, listing a percentage allocation as to work done for each manufacturer on the pay stubs of the contractor's employees is not necessary, in that more reliable records exist -- e.g., both the manufacturer and contractor will have records of payments, invoices and purchase orders which will enable the Labor Commissioner to determine the proportionate share of work the contractor has performed for each manufacturer on whose behalf it has manufactured garments.

Zumwalt: The proposed record keeping requirements for both manufacturers and contractors,

though seemingly insignificant, will require additional oversight to ensure the accuracy of the records, and may make contractors unwilling to enter into contracts to manufacture small quantities of garments.

Bas: Supports the regulation, as the detailed information that will be required on contracts and itemized wage statements will help workers as well as the Labor Commissioner identify guarantors and assist in determining each guarantor's proportionate liability.

Bates: Requirement in subsection (c) that contractors enumerate the percentage of time that each contractor's employee is spending on the work of each manufacturer is impracticable. It is too difficult to track each employee's time in that manner. This regulation is inconsistent with Labor Code §226 and the IWC wage orders, which provide for detailed reporting requirements. Admittedly, there is no express preclusion; but there is an implication that the area is already covered. Existing record keeping requirements under Labor Code §226 and the IWC wage orders are sufficient -- there is no need for this extra reporting requirement.

Rodriguez: Payroll services like ADP say that they cannot generate itemized pay stubs with the information that is required. Contractors will have to hire a payroll clerk just to handle this task.

Chung: This regulation will foster proper identification of guarantors, which is necessary for effective enforcement of AB 633. Present enforcement is hampered by the absence of written records of business dealings between manufacturers and contractors. By requiring documentation of these business dealings, this regulation will effectuate the wage guarantee. However, a provision should be added to authorize the Labor Commissioner to assess a penalty for failure to comply with the registration requirements of this section, and to permit penalties collected to be placed in a special account to be paid out to employees whose final judgments for unpaid wages have not been satisfied.

MODIFICATION TO REGULATION: Subsection (c) was modified to ease garment contractors' recordkeeping requirements. Prior to this modification, the proposed regulation required contractors to provide their employees with information in writing, on their paycheck stubs, specifying the name(s) of any manufacturer(s) for whom the contractor performed any garment manufacturing operations at the location at which such employees were employed during the pay period for which they are being paid; and if work was performed for more than one manufacturer during this period, to list, next to each named manufacturer, the percentage of work time during the pay period that the employee performed work for the named manufacturer. The latter requirement, to list percentages of time if more than one manufacturer is listed, has been deleted.

Comments Received Following Modification--

APALC: We object to the amendment of subsection (c) that eliminates from the itemized wage statement the percentage of the employee's work time for each manufacturer listed. This information is needed to ensure that workers, and the Labor Commissioner, have enough information to determine each manufacturer's proportionate share of liability under the wage guarantee. Also, the revisions suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Simmons: Even though §13659, as revised, no longer requires contractors to identify the percentage of time each employee spends on work for each manufacturer, we oppose the retention of language requiring contractors to identify on their employees' pay stubs the names of every manufacturer for which that employee performed work during the pay period. This requirement should be deleted. The tracking of which of the contractor's employees are working on projects for which manufacturer is unduly burdensome. Also payroll processing companies and programs are unable to include this information on each pay stub. So contractors would have to devote significant effort to manually adding this information to each pay stub. Furthermore, this requirement is not authorized by statute, exceeds the Labor Commissioner's authority, and is inconsistent with the requirements of Labor Code §226 and the IWC orders. Finally, this requirement would compel disclosure of the contractor's trade secrets and proprietary information. Manufacturers are the customers of contractors and courts have found customer lists to be a protected trade secret. (See, e.g., *ABBA Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1.) Putting this information on check stubs will allow competitors to determine how a company prices work, sets pay and conducts business, and employers who comply with this requirement will be placed in a competitive disadvantage.

Metchek: This provision requiring contractors to list on each employee's itemized wage statement the names of each manufacturer and the percentage of that employee's time that he or she worked for that manufacturer is a bookkeeping nightmare, requiring additional clerical staffing on the contracting floor. Also, it infringes on business privacy rights.

Luevano: Proposed regulations, and in particular §13659(c), will impose an onerous burden on garment industry operations, and encourage industry employers to move operations outside of California. Payroll companies that provide services to contractors do not have software in place to process information concerning the identity of manufacturers, or to include such information on the contractor's employees' pay stubs. The need to include this information on every paystub, when most garment contractors pay their employees weekly, will create time pressures that may result in inadvertent omission of information, thereby exposing contractors who act in good faith to disciplinary consequences. The inclusion of the names of manufacturers on the contractor's employees itemized wage statements will result in an unwieldy pay document, without any discernible benefit to the employee recipient. The inclusion of this information will not increase the employee's likelihood of receiving required wages. Employers may suffer serious harm from

having such information on employee pay stubs, as the contractor will not be able to prevent its employees from disclosing this information to third parties, including business competitors.

Response: AIWA's suggestion to amend subsections (a) to require that applicants for renewal of registration must provide the same certification as that required for applicants for an initial registration is unnecessary, in that the Labor Commissioner treats all applicants for registration the same, regardless of whether the person is applying for a new registration certificate or a renewal of an existing registration certificate. All applicants must make the required certification. Likewise, AIWA's suggestion to amend subsection (c) to make a contractor's failure to provide required information on itemized wage statements grounds for denial of an application for renewal of registration is unnecessary, in that the Labor Commissioner does not distinguish between applications for new or renewed registration. The suggestion to authorize the Labor Commissioner to assess a penalty for failure to comply with the registration requirements set out in this proposed regulation pursuant to Labor Code §2678(a)(2) is unnecessary, in that the only "registration requirement" in this regulation, set out at subsection (a), is the requirement that the applicant sign a certification, on the application for registration, that it will do certain things -- namely, that it will include certain specified information in a written document every time it enters into, or modifies a contract the performance of garment manufacturing operations, and keep these documents and make them available to the Labor Commissioner for 4 years from the date of execution. The failure to sign this certification will result in the denial of the application on the ground that it is not complete. The failure to later do any of these specified things are not violations of "registration requirements," within the meaning of §2678(a)(2), but rather, a violation of subsection (b) of this regulation, which expressly specifies that the failure to do any of these things shall constitute grounds for revocation of registration or denial of an application for registration.

Turning to comments received from industry representatives, Simmons' suggestion that the requirement that contracts to manufacture garments be in writing and contain certain specified information amounts to a violation of the constitutional right to contract is patently ludicrous. It is a basic tenet of black letter law that the right to contract is not absolute, both with respect to the substantive contractual provisions and with respect to the manner of entering into a contract. There are examples too numerous to mention of laws or regulations that require certain types of agreements to be in writing, and to contain certain specified provisions. We are unaware of any court decision finding such laws or regulations unconstitutional. Levy's suggestion to modify proposed subsections (a) and (b) by allowing contractors and manufacturers to list some of the information that the proposed regulation requires to be listed on a written contract for the manufacture of garments to instead be listed on a "blanket agreement" that would presumably apply to subsequently executed contracts would often result in outdated and no longer accurate information, as the information listed on the "blanket agreement" is likely to change over time. Likewise, the suggestion to instead allow that information to be listed after the work was performed, on the contractor's invoice, would fail to adequately protect employees in that by then it would be too late for a manufacturer to order a halt to the work if the information showed that

the contractor was not currently registered or not covered by workers' compensation insurance.

Simmons suggestion that the requirement as to garment contractors to list certain information on their employees' itemized wage statements is inconsistent with the provisions of Labor Code §226 and the IWC wage orders is belied by the fact that nothing in §226 or the wage orders purports to prohibit the Labor Commissioner from adopting a regulation that would require certain employers to provide certain information, in addition to what is required by §226 or the wage orders, on employee paycheck stubs. Labor Code §226 specifies what information must be provided to all employees (other than public employees) on their pay stubs. Likewise, IWC Order 1-2001 (8 CCR sect. 11010), at paragraph 7, specifies certain records that must be provided to employees by all employers in the manufacturing industry. The Labor Commissioner is authorized, pursuant to Labor Code §2672, to enact "all regulations . . . necessary" to carry out the provisions of the garment manufacturing laws. The existing requirements of Labor Code §226 and IWC Order 1-2001 do not provide garment contractor's employees with sufficient information, on their pay stubs, to be able to identify the manufacturers for whom they manufacture garments, and unless workers possess that information, they will be unable to enforce AB 633's wage guarantee. This proposed regulation is not inconsistent with any other law, covers an area that the Labor Commissioner is statutorily authorized to regulate, and is necessary to carry out and enforce the provisions of AB 633.

Virtually every industry representative who commented on subsection (c) argued that as originally drafted, it was unduly burdensome and, to some degree, not necessary. Initially, this subsection would have required contractors to list the following information on their employees' itemized wage statements: 1) the identity of any manufacturer(s) for whom the contractor performed any garment manufacturing operations at the location at which such employees were employed during the pay period covered by the itemized wage statements, and 2) if more than one manufacturer is listed, the percentage of each employee's work time during the pay period that the employee performed garment manufacturing operations for the named manufacturer. Industry representatives argued that the entire subsection should be deleted, while employee advocates urged its retention without modification. The Labor Commissioner concluded that the first part of the proposed regulation should be retained, with the second part eliminated, and the proposed regulation has been modified accordingly. The first part -- the identification of manufacturers on workers' pay stubs -- is a necessary, if not essential element, in the enforcement of AB 633's wage guarantee. Without this requirement, garment workers may have no means of acquiring information as to the identity of any wage guarantors. We disagree with assertions that this information is already available. Although it is true that every applicant for registration as a contractor must list, on its application for registration, all manufacturers for which it has performed garment manufacturing operations in the past three years, that only tells us what happened in the past, not what will happen in the one year registration period after the application is approved. Moreover, it doesn't break down this information on a pay period by pay period basis, and liability as to wage guarantors under Labor Code §2673.1(b) is proportionate based on the work performed at the worksite during the particular pay period in

which minimum wages and overtime are owed.

Although there is a risk that some contractors will put inaccurate information on the pay stubs they give to their workers, the manufacturers identified on the pay stubs will be given every opportunity to provide their own evidence as to whether the contractor manufactured garments for those manufacturers during the pay periods at issue, and the proportionate share of each manufacturer so identified. As with any other factual dispute, the Labor Commissioner (and presumably, the courts) will consider and weigh all of the available evidence. Thus, we reject the assertion that requiring contractors to identify manufacturers on employee pay stubs will somehow put manufacturers at an evidentiary disadvantage. The fact is that as long as the manufacturers are identified on the pay stubs, it is not necessary for the contractors to also list each manufacturer's proportionate share on those pay stubs. With the names of the manufacturers, the Labor Commissioner can subpoena each of the named manufacturers to get each manufacturer's records of their business dealings with the contractor, from which the Labor Commissioner can reach its own conclusions as to proportionate share of liability for the wage guarantee. Thus, we reject APALC's suggestion that the now deleted requirement that percentages reflecting each manufacturer's proportionate share be listed on pay stubs is necessary to ensure that workers and the Labor Commissioner have enough information to determine each manufacturer's proportionate share.

The suggestion that payroll companies are incapable of listing the names of manufacturers on pay stubs borders on ludicrous. If the information is provided to the payroll companies by the contractors that use their services to generate employee paychecks, we are quite confident that these manufacturers' names can easily be listed on the pay stub. Whether or not pay stubs listing this information might be "unwieldy" is a function of the number of manufacturers for whom the contractor manufactures garments in a given pay period. But if anything, the need for this information is greatest if the contractor is performing garment manufacturing operations for a large number of manufacturers, as employees will have no other means of knowing the identities of these manufacturers. The inclusion of this information will make identification of these wage guarantors possible, so as to dramatically increase the employees' likelihood of receiving their required wages. Indeed, we cannot think of any other means, nor has any been suggested to us, that would work as well in informing garment workers of the identity of wage guarantors, so as to enable the Labor Commissioner to take appropriate further steps to investigate and determine proportionate share. The privacy considerations cited by industry representatives are not absolute, and employers cannot claim that information that would enable the employees of garment contractors to identify the manufacturers for whom they are performing manufacturing operations constitutes a "trade secret" when, without that information, it would be utterly impossible for these workers, and the Labor Commissioner, to enforce AB 633's wage guarantee. The need to ensure that garment workers will be paid required wages compels the conclusion that asserted "privacy considerations" as to the identity of wage guarantors must give way to the need for that information.

Comments Supporting the Adoption of Provisions that Do Not Fall Under any of the Proposed Regulations --

AIWA: 1) To ensure adequate investigation of guarantors, a regulation should provide: "During the course of investigating a claim pursuant to [Labor Code §2673.1(c)], the Labor Commissioner shall issue a subpoena duces tecum requiring each guarantor to submit to the Labor Commissioner those books and records as may be necessary to investigate the claim and determine the proportionate liability of each guarantor, including but not limited to invoices and written contracts for work performed for the guarantor by the contractor during the period included in the claim. Failure to comply with such a request for books and records, within 10 days of the request by the Labor Commissioner, shall constitute grounds for revocation of registration or denial of an application for registration."

2) An adequate investigation must include investigation by the Labor Commissioner of whether there is successor liability under Labor Code §2684. A regulation should therefore explicitly provide: "Pursuant to Labor Code §2684, prior to the meet and confer conference, the Labor Commissioner, as part of its investigation of an claim made pursuant to §2673.1(d), shall investigate the issue of successor liability and include in the findings and assessment a determination of whether the successor meets any of the criteria listed in §2684(b)(1) through (4)."

3) The filing of a bankruptcy petition by the contractor does not divest the Labor Commissioner of jurisdiction to proceed on the contractor's employee's claim for wages, as AB 633 created a guarantor that would be responsible for payment of wages to the contractor's employees if the contractor files for bankruptcy. This should be made clear by a regulation that expressly states: "Bankruptcy of a particular contractor or guarantor does not in any way limit the Labor Commissioner's authority to proceed against any other contractor or guarantor pursuant to the expedited claims procedures under Labor Code §2673.1(d) or through a civil suit under Labor Code §2673.1(j)."

Seville: Regulations ought to clarify that claim against guarantors can go forward if contractor files bankruptcy.

Bas: Same comment as that made by Seville re: contractor bankruptcies.

Chung: Regulation should be adopted to require Labor Commissioner to issue subpoena duces tecum to compel guarantors to provide necessary records to determine each guarantor's proportionate liability. Suggest regulation requiring Labor Commissioner to investigate successorship and set out findings on that issue in the assessment.

Comments Following Modification of Regulations:-

APALC: The proposed regulations suggested by AIWA, above, should have been adopted by the Labor Commissioner.

Response to Comments Supporting the Adoption of Provisions that Do Not Fall Under any of the Proposed Regulations: 1) The Labor Commissioner has the right, under statute, to issue subpoenas duces tecum to compel the production of records. (Labor Code §§92, 93.) There is no need for a regulation requiring the Labor Commissioner to issue a subpoena duces tecum to a manufacturer identified as a potential guarantor, in that, and since the adoption of AB 633, this has been the routine practice that the Labor Commissioner follows in investigating garment contractor's employees' wage claims. Regulation §13631 already provides that failure to provide records to the Labor Commissioner within ten days of the date of request shall constitute grounds for revocation of registration or denial of an application for registration, so there is no need to restate in any other regulation the licensing consequences should a manufacturer not comply with a subpoena duces tecum issued by the Labor Commissioner.

2) Successor liability, under Labor Code §2684, is limited to the liability of the successor to the contractor for wages owed to the contractor's employees; it "does not impose liability upon a successor [to a wage guarantor] for the guarantee of unpaid minimum wages and overtime compensation set forth in subdivision (a) or (b) of §2673.1." The procedures set out in Labor Code §2673.1(d) are specifically intended for the investigation and adjudication of "claims filed with the Labor Commissioner for payment of wages pursuant to subdivision (c)." Subdivision (c) expressly refers to claims to enforce the wage guarantee. Thus, the investigation conducted under subdivision (d) is focused on the amount of wages owed by the contractor and the determination of the identity of any guarantors and the proportionate share of each guarantor's liability. Section 2673.1 imposes extremely tight time limits on the Labor Commissioner with respect to the conduct of this investigation. To the extent practicable, the Labor Commissioner will seek to ascertain the identity of any successor employer that may be liable for the contractor's unpaid wages, and to include that successor as a defendant in the proceedings set out in Labor Code §2673.1. But a regulation requiring the Labor Commissioner to make determinations about successor liability in the context of these proceedings is unwarranted, in that the criteria for establishing successor liability, enumerated at Labor Code §2684, may require more detailed investigation that cannot be completed within the time limits established by §2673.1, and there is no statutory requirement that successor liability can only be enforced through the procedures set out at §2673.1. Insofar as there will be cases where it is more appropriate for the Labor Commissioner to enforce successor liability through methods other than those set out in §2673.1, which would allow the Labor Commissioner more time to conduct any necessary investigation, it would be unwise to require an investigation and a determination of whether or not there is successor liability in every wage claim processed under §2673.1.

3) It is beyond dispute that the bankruptcy of a particular contractor or guarantor does not in any way limit the Labor Commissioner's authority to proceed against any other contractor or guarantor pursuant to the expedited claims procedures under Labor Code §2673.1(d) or through a

civil suit under Labor Code §2673.1(j). Indeed, the very purpose of AB 633's wage guarantee is to provide garment contractor's employees with an alternative source of recovery for unpaid minimum wages and overtime in the event that the contractor by whom they are employed fails to pay those wages. The fact that such failure may be the result of the contractor's bankruptcy has no effect on the continuing liability of any wage guarantors for payment of the unpaid minimum wages and overtime. Likewise, the bankruptcy of any wage guarantor would have no effect on the continuing liability of the contractor and any other guarantors. The stay of proceedings that results from the filing of a bankruptcy petition does not stay proceedings against any entity other than the entity that filed the bankruptcy petition. In short, unlike traditional wage claims that are filed only against the employer that employed the worker, and that may be stayed by the filing of a bankruptcy petition, a claim under AB 633 will proceed against any and all remaining contractor(s) or guarantor(s) that are not protected by the stay, which only applies to the entity that filed the bankruptcy petition. There is nothing in the Bankruptcy Code that would serve to stay proceedings against entities other than the entity that filed the bankruptcy petition. We do not believe that a regulation is needed to state this obvious legal principle.

General Comments that Either Relate to the Proposed Regulations Very Broadly, as a Whole, or that Relate to AB 633--

Simmons: The regulations, taken as a whole, create burdensome and oppressive requirements that will harm the garment industry, and lead to the loss of businesses and jobs. The industry is already subject to inspections and a level of regulation that are unparalleled in other industries. The Labor Commissioner's conclusion that these regulations will only result in a minimal economic impact is incorrect.

Anonymous: Manufacturers should not be responsible for the acts of their contractors. Requiring manufacturers to guarantee the payment of minimum wages and overtime to employees of their contractors could put manufacturers out of business.

Lee: Contractors and their workers suffer when manufacturers shut down or file bankruptcy without paying the contractors for work that was performed.

Ow: The Labor Commissioner should publish and distribute materials explaining workers' rights and wage and hour requirements in languages other than English, that are spoken by garment workers, such as Chinese and Spanish.

Bas: The addendum to the AB 633 wage claim form needs to be translated into languages other than English. Also, the Chinese translation of the basic wage claim form does not provide enough blank space for workers to fill out the questions.

Levy: Although we have no objections to the vast majority of the proposed regulations, some of the proposed regulations are so onerous that if they are adopted without modification,

manufacturers will find it virtually impossible, for business reasons, to continue to engage the services of contractors located in California. One of the largest retail chains in the United States issued a directive some time ago forbidding any garments manufactured in California to be carried in any of its retail stores in the United States. Other major retailers have taken similar steps. Regulations should, of course, provide protections to contractors' employees to ensure they get paid minimum wages and required overtime. But beyond that, regulations should encourage garment industry to stay in California. In order to do that, regulations should provide precise definitions and standards to guide business, to eliminate uncertainty, and should be user-friendly, so that businesses can live with the regulations.

Bates: Many of the proposed regulations exceed the Labor Commissioner's statutory authority, usurp the authority of the Industrial Welfare Commission to regulate employees, and are violative of constitutional rights of due process, equal protection, and privacy. These rules will cause businesses and jobs to leave the State--out of state manufacturers will decide not to do business with any California contractors.

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Rodriguez: Over-regulation will cause some contractors who try to comply to go out of business.

Perilman: The regulations need to be simpler and more user-friendly. By raising the cost of doing business, AB 633 encourages contractors to evade registration and operate illegally.

Response to General Comments: With the passage of AB 633, the Legislature made the determination that in order to ensure the payment of minimum wages and overtime wages to garment contractors' employees, the manufacturers that contract with contractors for the performance of garment manufacturing operations should be liable for their proportionate share of any such wages owed to the contractor's employees. AB 633 also set out detailed procedures for the investigation and adjudication of garment contractor's wage claims. These regulations were devised as the least burdensome means of effectuating the requirements of AB 633. The duties that have been created by these regulations are necessary to enforce the provisions of AB 633, and to carry out the investigations and adjudications of wage claims filed under this law. These new duties -- created by these regulations (as distinct from duties that were created by the legislation that these regulations were designed to effectuate) -- will have no more than a minimal economic impact on garment contractors and manufacturers. These regulations cannot contravene or undercut the statutory provisions of AB 633, and suggestions for certain "user-friendly" regulations were rejected if those suggestions were in conflict with provisions in AB 633. The regulations that we have proposed will not prevent law-abiding businesses from continuing to flourish in California's garment industry.

ALTERNATIVES DETERMINATION

The Labor Commissioner has determined that no alternative would be more effective in carrying out the purposes for which these regulations are proposed or would be as effective and less burdensome to affected private persons than these regulations.